

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Toll Free Service Access Codes

CC Docket No. 95-155

TO: The Commission

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COMMENTS
1-800-FLOWERS

INTRODUCTION

1-800-FLOWERS SM, Inc. is a business which did not exist before the Commission permitted the provision of 800 numbers. The Commission's 800 decision was an important communications policy decision and it has spawned many new businesses, improved the services and access of other businesses and created important benefits for the public which has enthusiastically embraced the convenience and new choices made available through 800 calling.

The Commission is to be commended for proposing initiatives in this proceeding to avoid harming consumers and those 800 business users that have built businesses and developed unique brands around

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and in reliance upon the 800 number policy. The instant docket can develop an appropriate framework for the next generation of numbers, one which provides an ample supply of new numbers without compromising the businesses we have built and seek to continue to develop.

The 800 experience provides several consumer lessons, including the reality of consumer confusion, mistakes and deception in the public's use of 800 numbers. These lessons must be taken into account as the Commission implements the new 888 number plan.

The 800 experience also demonstrates that businesses can be, and have been, created and enhanced by the Commission's policies. Similarly, these businesses will be harmed if the introduction of the new number codes does not appropriately reflect their needs.

New jobs, new economic opportunities here and abroad, and new public choices and convenience are the products of the Commission's 800 policies and the industry's efforts to build businesses using this service. 1-800-FLOWERS fully expects that with appropriate Commission 888 policies, the 800 success story will continue and will be expanded upon by the new 888 service.

A BUSINESS USER'S PERSPECTIVE

1-800-FLOWERS is a business which was made possible by the creation of the 800 code. Prior to that time, we, as the owners of this company, ran a conventional florist business which began with one store and had grown into a 14 store operation. What that small retail business experience showed was that our customers were starved for time. They travelled; they worked hard; and they had real problems keeping up with personal gift needs. With the Commission's creation of 800 numbers, we recognized the opportunity to serve these customers, to give them the ability to reach a business they knew to have quality products and reliable service. 1-800-FLOWERS is the manifestation of that idea and opportunity.

Since 1987, 1-800-FLOWERS has devoted hard work and significant investment to build a unique brand identity and an association between the name, its quality and reliability and the toll free phone number. This florist and gift business has been built around this simple message and operating principle, and it has become a highly successful and well recognized brand. The 1-800-FLOWERS name and brand are the symbol of who the company is, what that business represents and how it can be reached. As new services have been introduced, from on line services to new retail stores, the linkage between the brand name and the phone number has intensified.

Today, the company employs 2,500 people (3,000 during holidays) across the country. With Fiscal Year 1995 system-wide revenues exceeding \$200 million, 1-800-FLOWERS is a thriving and growing entrepreneurial undertaking. We expect to continue our business expansion and introduce exciting new products and services. Like any relatively new business, we have just begun to learn how we can meet customer needs.

This company is very grateful to the Commission. First, the Commission adopted policies to foster the 800 service availability. Today, the Commission appears, rightly, prepared to recognize the legitimate needs of 800 businesses which have made investments, established brands and developed customer expectations because of and wholly dependant upon Commission policy. These realities are extremely relevant to the Commission's deliberations concerning the new 888 access code, and beyond.

To assist the Commission's efforts, this company has reviewed the Commission's Notice of Proposed Rulemaking and has developed responses in those areas where it has a view or an opinion.

**A RIGHT OF FIRST REFUSAL IS THE BEST PROTECTION
FOR CONSUMERS AND 800 BUSINESSES**

1-800-FLOWERS believes that the right of first refusal is the best way for the Commission to afford the policy protection needed by 800 users such as this company. It will allow businesses to decide what is appropriate for themselves and their customers and to protect themselves against unfair competitive tactics. It is also the least regulatory and litigious method by which to implement the new 888 service and the least burdensome for the carriers and the number administrators.

This company would exercise the right of first refusal if it were made available to us for several reasons. First, by using the corresponding 888 numbers, 1-800-FLOWERS will ensure that its customers will be able to reach the company. This ability to be reached by its customers while they become familiar with the new code will cut down on customer confusion and frustration. Second, "would-be" competitors will not be able to use the new access codes to unfairly compete with 1-800-FLOWERS by siphoning its customers. This protection will help the company and its customers, franchisees and affiliated florists, all of whom are harmed when orders intended for 1-800-FLOWERS are received by other companies when customers intended to do business with 1-800-FLOWERS. Third, 1-800-FLOWERS will be able to continue with its plans to grow its business in the future by developing new services.

Customer Confusion and Deception

Based upon the common experiences of those companies which have branded their 800 numbers, it is almost certain that customers will be confused during the introductory phase for the 888 access code. They will make mistakes, and they will misdial. It is equally certain that competitors of these 800 companies will exploit every opportunity given to them to take advantage of customer confusion to siphon off the customers of existing 800 companies.

In the administration of its 800-based business, 1-800-FLOWERS has had many communications from customers who have mistakenly reached other florist services when they intended to reach 1-800-FLOWERS but misdialed its number. One common mistake has been the substitution of a zero for the "0" (6 on the phone key pad) in "FLOWERS". After another florist service company obtained this misdialed number, a myriad of 1-800-FLOWERS customers reported reaching that company in error when attempting to reach 1-800-FLOWERS and that, unaware of their error, they had placed an order with the other company. 1-800-FLOWERS has learned about the mistake when the customer has called (correctly this time) to report a problem with the order, and of course 1-800-FLOWERS would not have a record of the order since it had not been placed here.

1-800-FLOWERS places a high premium on its reputation for reliable, high quality service, and that reputation is imperiled

when customers are diverted to competitors, and the customer is unaware of the fact they are not dealing with 1-800-FLOWERS. In a situation where the competitor does not meet 1-800-FLOWERS' high standards or quality control, the customer's service experience with the competitor is attributed to 1-800-FLOWERS. Further, whether that service was good or bad, the customer's sales revenue unfairly enriches the competitor, who developed neither the market nor the customer's intention to place an order.

With the introduction of the 888 code, it is reasonable to expect that customers will be confused. Some may think that 800 numbers have been converted, and 1-800-FLOWERS believes that it is an important aspect of the customer education process for these calls to be answered, so our customers will not be confused and frustrated and can be advised that the 800 numbers are still in effect. 1-800-FLOWERS would like to use the 888 equivalents so it can be reached by these customers. By dealing directly with them, 1-800-FLOWERS believes it can further their educational process. This company believes that it would be best not to promote the 888 number as an alternative for 1-800-FLOWERS and to promote the 888 number for other, new services when it has become clear that the public is familiar with the new codes.

1-800-FLOWERS wants to facilitate the smooth introduction of the 888 code. It also seeks the ability to prevent would-be competitors from taking unfair advantage of this transition and of

the company's efforts to build a nationally and internationally known and trusted business.

This company does not intend to "warehouse" the 888 numbers it would receive under a right of first refusal policy. Rather, they can be used to support new florist services, such as corporate focused services as distinct from retail, consumer based services.

In summary, this company's experience with customer confusion and misdialing and competitive opportunism, an experience shared by other 800 businesses, has led it to conclude that the only workable solution for the Commission in this proceeding is to give such 800 companies a right of first refusal to obtain their corresponding numbers in the 888 access code category. Assuming that the Commission agrees that such companies should be able to protect the businesses that have been built and the customers being served, then the appropriate inquiry is to address the rules to put in place to discourage frivolous use of this right.

Demand for Numbers Using the Right of First Refusal

The NPRM seems to suggest that a right of first refusal becomes a less desirable policy option as the number of potential businesses increases. As one user, we are not in a position to estimate the number of companies which would want to exercise this right. However, the adverse impact on certain businesses, if this protection is not adopted, is so great that the Commission should

explore ways to set appropriate standards to limit the number of companies using this protection rather than to consider rejecting the policy outright.

In the first place, this suggestion assumes that current 800 users have static number needs, that they would not be seeking new numbers in whatever code is available. For this company, at least, that is an incorrect assumption. As stated earlier in these comments, it is the company's intention to make use of the numbers assigned under the right of first refusal, and these would be numbers which the company would have sought in any event.

Next, the right of first refusal should be exercisable by those with the most at stake in their numbers. This should be measured by the rules adopted by the Commission, which would reflect the character of the 800 usage and hence the extent of the protection needed in the 888 code.

Appropriate Rules

The Commission should consider adopting rules which a company would be required to meet in order to exercise the right of first refusal. These requirements would discourage users which did not have a strong level of need and commitment from exercising the right. For example,

1. Users should be required to use the 888 number. In the case of 1-800-FLOWERS, as discussed above, initially the 888 number

would be used to assist customers who misdial believing that 800 numbers had been changed or otherwise being confused by the new number system. The company would not promote 888 as an alternative to 800 in its advertising and promotional materials in order to avoid the possibility of customer confusion. The company would cooperate with the carriers' education program and supplement it as appropriate in its materials and actions. Any customers reaching 1-800 FLOWERS by using the 888 number equivalent would be advised that in the future they should return to using 1-800-FLOWERS.

At an appropriate, future time, when it was determined that customers and consumers generally had adapted to the new code's proper use, the company would use 888 numbers for new undertakings.

2. Users should not have this protection free of charge. Those who exercise a right of first refusal should be assessed a one time fee. The fee should be high enough to discourage hoarding or frivolous use and to compensate for the added costs of administering this right of first refusal allocation process. A value based fee would be an inappropriate tax on 800 users since the value in the 800 number (and in the 888 equivalent) has been created by the 800 company, not the carrier or the Commission. Competitive bidding is not a reasonable option and would be unworkable, since a right of first refusal would lead to only one eligible recipient.

Perhaps a fee could be based on usage, with 800 users having the greatest, and hence most efficient, call volume paying less than those with light volumes. While some may suggest that the fee should be eliminated for some categories of recipients, this company believes that all users receiving numbers under this right of first refusal should pay some reasonable fee for this special status. This company does not have a specific suggestion of an amount or scale that would be appropriate, but it is willing to work with the Commission to develop an appropriate formulation.

Nor does this company have a specific suggestion regarding the recipient of these funds. Like administrative fees, the funds could help to defray the costs to administer the new 888 program or to increase the spending for consumer education.

Other 800 User Options

While 1-800-FLOWERS prefers the right of first refusal and plans to use its number equivalents, it is possible that some business users may not desire this option but still have concerns about how their corresponding 888 numbers are used. For such companies, the Commission may wish to consider permitting these numbers to be placed at the end of the assignment line. By deferring assignment in this way, the public will have time to adapt to the new numbering system, which should mitigate the harm which otherwise could occur.

This is not a desirable option for 1-800-FLOWERS because this company wants to be sure its customers' calls are answered at all times after the new number system is introduced and that this company is the one answering its customers' calls. However, to the extent this "end of the line" option affords sufficient protection for certain 800 uses, it would reduce demand for numbers under the right of first refusal.

It has been suggested that 800 users needing protection of the equivalent 888 numbers could be protected by restricting the corresponding 888 numbers to users that would not be allowed to use that number in competition with the 800 business. 1-800-FLOWERS has strong reservations with the workability of such a restriction, and especially believes it is far inferior to the right of first refusal. As with the industrial classification proposal, this company believes a non-compete policy would place a heavy enforcement burden on the Commission and on the carriers, without effectively restricting competitors. Coupling it with the "end of the line" option may improve its viability, but not sufficiently to become an effective alternative to the right of first refusal.

**INDUSTRIAL CLASSIFICATION PROTECTION WOULD BE
UNWORKABLE AND DIFFICULT TO ENFORCE**

1-800-FLOWERS does not believe that code assignments based on industrial classification are workable. It does not seem to be possible to define and segregate competitors with clarity based on such designations, nor would it be able to address situations where

number holders change their business after numbers have been assigned to them. Hence, this option would not be effective in stemming the fraud about which 1-800-FLOWERS is very concerned.

The companies which have demonstrated their creativity in finding misdial and default numbers to siphon customers of 800 businesses will show equal creativity in avoiding and exploiting the faults in the classification system. 1-800-FLOWERS believes that without a right of first refusal the new code administration will experience severe fraud and questionable practices by competitors of 800 services.

Further, this option does not deal at all with the problem of customer mistakes and confusion. If a plumbing company gets a call intended for 1-800-FLOWERS, the customer may not have been deceived, but he or she will not be able to make the intended purchase. One has to question how much time the the person or company receiving the call will spend explaining the customers error, especially since that person or company will be paying for the call. In other cases the customer may not even realize that the call was misdialed, for example if the call went unanswered or was put on hold for an extended time. This company would have a dissatisfied or lost customer, without knowing that the mistake had occurred or being in any position to rectify the problem.

This option would plunge the Commission into a quagmire of categorization and enforcement matters, requiring resources, constant vigilance and prompt action when mistakes and deceptions occur. 1-800-FLOWERS believes this an undesirable situation, especially with another, self-enforcing option available.

**800 NUMBER PROTECTION IS
A COMMUNICATIONS POLICY MATTER**

The NPRM asks whether trademark law affords adequate protection. Based on the experience of 1-800-FLOWERS, trademark law should not be relied upon to protect 800 users, both as a matter of law and as a matter of policy.

Communications policy fostered the 800 service, not trademark law. The 800 businesses and customers are beneficiaries of communications policy, not trademark law. Trademark law will not address customer impacts when calls are unanswered or misdialed.

Not all brands fall within the narrow categories of trademark protection. Yet many 800 businesses have built strong brands based on the toll free numbering policy of the Commission. 1-800-FLOWERS believes that a company which has built its business and its brand identity in reliance upon Commission policy should be empowered to protect itself and its customers from others seeking to take unfair advantage of that brand success.

Defaulting to trademark law would clog the courts with litigation, while failing to address the legitimate needs which the Commission has identified. The Commission has the authority, the responsibility and the ability (through its assignment policy) to meet the needs of users and customers, and it should do so.

POLICIES REGARDING FUTURE ACCESS CODES ARE PREMATURE

It is premature to address the question whether this right of first refusal should apply to other new number codes when they are introduced. That decision should draw on the experience of the transition into the 888 code. For example, the Commission should assess how many numbers were assigned based on the right of first refusal, how those companies assess that experience and the way they view the potential impact of a new code(s) on their customers and their businesses. If the Commission adopted the end of the line protections, then it would be useful to understand that experience, especially its impact on the administrative process and its effectiveness.

Also, it will be important to know how the public adapted to the 888 code. For example, were they unreasonably frustrated when misdials to 888 ended as unanswered calls or were routed to wrong parties, and what timeframe was needed to acclimate the public to the new 888 code. Lastly, it will be useful to know how the new code was used, and the extent to which 800 experience remained relevant.

CONCLUSION

The Commission has correctly identified the compelling need of 800 users which have branded their numbers as part of their 800 service. It has correctly suggested that it is appropriate to address these needs as part of this proceeding. It has correctly identified a course of action, the right of first refusal, which will be largely effective, self enforcing and self funding. It will use communications tools to protect the users and the customers of communications services, which seems to this company to be the best and the most appropriate course of action.

Respectfully submitted,

1-800-FLOWERS

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November 1, 1995